No. 87-1139

# In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN GAGLIARDI, PETITIONER

*v.*

DONALD E. ZIEGLER AND CATHERINE MARTRANO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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## TABLE OF AUTHORITIES

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Petitioner contends that United States District Court Judge Donald E. Ziegler should have disqualified himself from a suit naming the judge as a party-defendant and seeking injunctive and declaratory relief as well as personal damages for injuries allegedly caused by the judge's order in a prior proceeding.

1. In *Gagliardi* v. *McWilliams*, No. 86 Civ. 1998 (W.D. Pa. Oct. 30, 1986), Judge Ziegler entered an order pursuant to Rule 11 of the Federal Rules of Civil Procedure barring petitioner from filing any further complaints or other papers in the United States District Court for the Western District of Pennsylvania without leave of the court. Between August 6, 1986, and October 29, 1986, petitioner had filed in the district court seven complaints alleging violations of various civil rights statutes and naming as defendants a total of 181 parties (see Supp. App. on Appeal 4-23, listing docket entries for Civil Action Nos.

86-1659, 86-1738, 86-1956, 86-1998, 86-2068, 86-2106, and 86-2293). Judge Ziegler noted that petitioner had not stated a cognizable claim in any of these actions (*McWilliams*, slip op. 3, *reprinted in* Supp. App. on Appeal 26)[1] and concluded that a Rule 11 sanction was necessary to "protect the multitude of defendants currently sued or contemplated to be sued by Mr. Gagliardi from harrassment, vexation and needless legal expenses" (*ibid.*). Accordingly, Judge Ziegler ordered that "the Clerk of Courts for the United States District Court for the Western District of Pennsylvania be and hereby is enjoined from filing or causing to be filed any complaint or other paper from John Gagliardi or any known associate of John Gagliardi without first forwarding said paper to this court and obtaining [Judge Ziegler's] approval * * *" (Supp. App. on Appeal 28).

Petitioner appealed to the United States Court of Appeals for the Third Circuit. On April 6, 1987, the court of appeals stayed the Rule 11 order pending resolution of the appeal. The court of appeals subsequently vacated Judge Ziegler's order, holding that the district court erred in entering the Rule 11 sanction without affording petitioner notice and an opportunity to be heard. *Gagliardi* v. *McWilliams*, 834 F.2d 81, 82-83 (per curiam). The court of appeals, however, expressly refrained from deciding whether petitioner's filing of seven frivolous lawsuits against multiple defendants was such an abuse of the judicial process as to warrant imposition of sanctions;

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[1] All of these complaints alleged conspiracies on the part of the defendants to violate petitioner's civil rights. The complaints, however, failed to state facts evidencing a conspiracy. The district court therefore dismissed each action for failure to state a claim upon which relief could be granted. See *Gagliardi* v. *McWilliams*, 834 F.2d 81, 82 (3d Cir. 1987) (per curiam).

instead, it remanded the case to the district court with instructions to give petitioner notice to show cause why injunctive relief should not issue (*id.* at 83).

2. On March 2, 1987, while petitioner's challenge to the district court's Rule 11 order was pending before the court of appeals, petitioner filed this action against Judge Ziegler and the District Court Clerk, Catherine Martrano. The complaint alleged that the Rule 11 order of October 30, 1986 deprived petitioner of his right to sue without due process of law, that Judge Ziegler lacked Article III jurisdiction to enter such an order, that Judge Ziegler's actions constituted a "forbidden judicial Bill of Attainder," that the Clerk of the Court had participated in an illegal scheme by enforcing Judge Ziegler's order, and that petitioner had consequently suffered damage to his person, reputation, and business (Complaint 2-3). Petitioner therefore demanded declaratory and injunctive relief from past and future orders limiting his access to the courts. In addition, he sought $10,000 in damages. *Id.* at 3-4.

On March 3, 1987, Judge Ziegler, noting that the action "represents the latest round in a series of frivolous, vexatious, and redundant law suits" filed by petitioner (Pet. App. 3), dismissed the complaint for failure to state a claim on which relief could be granted. The court reasoned that the complaint simply repeated issues that had been previously resolved against petitioner in another case, Civil Action No. 86-2293. There, petitioner had attempted to amend the complaint to add Judge Ziegler as a defendant. The amended complaint, however, was subsequently dismissed for failure to state a claim on which relief could be granted.[2] Judge Ziegler held that petitioner could not

[2] Petitioner appealed No. 86-2293 to the Third Circuit. The appeal, however, was dismissed for failure to prosecute the case in a timely manner (Supp. App. on Appeal 22, Clerk's Notation of Record No. 7).

relitigate issues previously resolved against him and therefore dismissed petitioner's complaint (Pet. App. 3-4).

3. Petitioner challenged the dismissal of this action through two different avenues of review. Petitioner first appealed the dismissal of the complaint to the Third Circuit. Petitioner argued that Judge Ziegler should have recused himself because he was a named defendant. On July 30, 1987, the court of appeals issued a judgment order affirming the decision below without opinion (Pet. App. 5-6). On September 15, 1987, petitioner's request for rehearing by the panel and by the court of appeals en banc was denied.

Petitioner also filed a complaint against Judge Ziegler with the Judicial Council of the Third Circuit. On March 30, 1987, Chief Judge Gibbons found petitioner's allegations of impropriety to be frivolous and dismissed the complaint (Supp. App. on Appeal 38-42). Judge Gibbons noted that the courts had uniformly held that the mere naming of a judge as a defendant does not per se necessitate recusal (*id.* at 40). Judge Gibbons also stressed that 28 U.S.C. (& Supp. III) 372—the statutory provision governing complaints of judicial misconduct filed with the Judicial Council—was not intended to provide disgruntled litigants with an alternative means of challenging judicial actions that could be reviewed by appeal or mandamus (*ibid.*).[3]

4. During this time, petitioner continued to file new civil actions in district court. On November 1, 1987, petitioner filed a petition for a writ of habeas corpus allegedly on behalf of Janice Bochter, a defendant sentenced by Judge Ziegler in a criminal case (see *United States ex rel.*

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[3] Petitioner filed a petition for review of Judge Gibbons' decision. On June 2, 1987, the Judicial Council dismissed the petition for review for the reasons set forth in Judge Gibbons' earlier order.

*Bochter* v. *Meese*, No. 87 Civ. 2463 (W.D. Pa.)).[4] Judge Ziegler found that the habeas corpus petition was frivolous, vexatious, and redundant and issued an order requiring petitioner to show cause why he should not again be enjoined from filing actions in district court (*Bochter*, Order of Nov. 19, 1987).

In the interim, the Third Circuit overturned Judge Ziegler's prior Rule 11 order in *McWilliams*. Judge Ziegler subsequently discharged his show cause order in *Bochter* and, in addition, entered an order dissolving any impediments to petitioner's access to the court. Judge Ziegler also issued an order directing the Clerk to reassign several actions maintained by petitioner to another member of the court and recused himself from all future litigation instituted by petitioner (*Bochter*, Order of Dec. 21, 1987).

5. The lower courts have uniformly held that the mere fact that a judge is named as a defendant in a lawsuit does not per se necessitate recusal. Indeed, where the suit naming the judge as a defendant focuses on judicial orders entered in the course of prior litigation, a rule requiring recusal would aid a litigant in frustrating the ordinary processes of appellate review and improperly expose the judiciary to vexatious damage claims that are plainly barred by absolute judicial immunity.

a. In amending the recusal provisions set out in 28 U.S.C. 455, Congress cautioned that litigants "are not entitled to judges of their own choice" and advised that "each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision." H.R.

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[4] The court later determined that Bochter had never authorized petitioner to maintain any proceeding on her behalf or to represent her in any fashion whatsoever (Dec. 21, 1987 Hearing Tr. at 7, *United States ex rel. Bochter* v. *Meese*, No. 87 Civ. 2463 (W.D. Pa.)).

Rep. 93-1453, 93d Cong., 2d Sess. 5 (1974). A litigant cannot force a judge to disqualify himself from presiding over a matter by the simple expedient of filing suit against the judge. To the contrary, every lower court to address the question has agreed that a judge is not disqualified under 28 U.S.C. 455 merely because a litigant sues or threatens to sue him. *United States* v. *Grismore*, 564 F.2d 929, 933 (10th Cir. 1977), cert. denied, 435 U.S. 954 (1978); *United States* v. *Studley*, 783 F.2d 934, 940 (9th Cir. 1986); *Ronwin* v. *State Bar of Arizona*, 686 F.2d 692, 701 (9th Cir. 1981), cert. denied, 461 U.S. 938 (1983), rev'd on other grounds, 466 U.S. 558 (1984); *United States* v. *Blohm*, 579 F. Supp. 495, 505 (S.D.N.Y. 1983); *In re Martin-Trigona*, 573 F. Supp. 1237 (D. Conn. 1983), appeal dismissed, 770 F.2d 157 (2d Cir. 1985) (Table), cert. denied, 475 U.S. 1058 (1986); *Winslow* v. *Lehr*, 641 F. Supp. 1237, 1241 (D. Colo. 1986).

The central purpose of 28 U.S.C. 455 is to ensure litigants a fair forum in which to pursue their claims. *United States* v. *Will*, 449 U.S. 200, 217 (1980). Petitioner's suggestion that a judge must disqualify himself whenever he is named as a party to the litigation would frustrate rather than advance this objective. Indeed, the rule urged by petitioner would, as the facts of this case illustrate, permit litigants to circumvent the ordinary process of appellate review by appending frivolous damages claims to suits that merely challenge a prior judicial act. Each of petitioner's claims for relief in this action is predicated *solely* on the assertion that Judge Ziegler's prior Rule 11 order was improper. Such contentions can be—and were—reviewed on direct appeal. Here, however, petitioner also seeks to obtain collateral review of Judge Ziegler's order by raising the same legal contentions in a new civil action naming members of the court as defendants.

b. Moreover, petitioner's complaint does not state any cognizable claim implicating personal interests of the defendants; there is consequently no basis for recusal. First, petitioner's demand for injunctive and declaratory relief essentially seeks a new district court order lifting Judge Ziegler's previously imposed Rule 11 sanctions and freeing petitioner from any prospective limitation on his right to bring suit in district court (Complaint 3-4). As such, petitioner's demand for "equitable" relief against Judge Ziegler is, in substance, merely the functional equivalent of a request for reconsideration of the judge's prior order. Nothing in 28 U.S.C. 455 suggests that a judge's personal interest in his prior orders is so great that he must disqualify himself when presented with a request for reconsideration. To the contrary, Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure expressly contemplate that a judge may entertain requests for reconsideration of his or her own decisions. The bare fact that a litigant misguidedly denominates the judge as a defendant does not compel a different result.

Second, while the damages claims do implicate the defendants' personal interests, these claims are so plainly and unequivocally barred by judicial immunity that any possibility of an adverse effect on the judge's personal interests is too remote and insubstantial to require recusal. Cf. *Glick* v. *Koenig*, 766 F.2d 265 (7th Cir. 1985) (judge properly dismissed suit seeking damages against him for prior judicial acts because action was clearly barred by judical immunity). It is well settled that judges, as well as other individuals who are an integral part of the judicial process, are absolutely immune from damage claims arising out of official actions taken in furtherance of a judicial function. *Forrester* v. *White*, No. 86-761 (Jan. 12, 1988); *Briscoe* v. *LaHue*, 460 U.S. 325 (1983); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Imbler* v. *Pachtman*, 424

U.S. 409 (1976); *Pierson* v. *Ray*, 386 U.S. 547 (1967). Accordingly, unless the judicial action in question is taken in the clear absence of all jurisdiction, a judge is immune from all liability for his judicial decisions and orders, even if his actions were in error or in excess of his authority. *Forrester* v. *White, supra*; *Stump* v. *Sparkman*, 435 U.S. at 356-357.

There is no question that both defendants are entitled to absolute immunity in this case. First, the challenged conduct arises out of official judicial actions undertaken in furtherance of a judicial function. The complaint, on its face, grounds petitioner's claims exclusively on Judge Ziegler's Rule 11 order and the Clerk's enforcement of that order (Complaint 2). Petitioner has himself made it clear that "the case dealt only with the activity of Judge Ziegler in ordering John Gagliardi barred from the courts" (Pet. 16). Second, Judge Ziegler was well within his jurisdiction in limiting petitioner's ability to file further vexatious and frivolous complaints. The sanctions against petitioner were entered in the course of an on-going civil action pursuant to the court's inherent power under Rule 11 to limit perceived abuses of judicial process. Such sanctions, even if deemed to be inappropriate, are squarely within the ambit of the court's jurisdiction and therefore cannot give rise to personal liability to an aggrieved litigant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60340